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IN THE COURT OF APPEALS OF INDIANA

GEORGE B. WARREN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1004-CR-286
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0908-FB-93

November 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

George Warren appeals his convictions and fifteen-year sentence for two counts of Class B felony robbery. We affirm.

Issues

Warren raises two issues, which we restate as:

I. whether the jury was properly instructed; and

II. whether his sentence is inappropriate.

Facts

The facts most favorable to the convictions show that, on August 25, 2009, Brittany Cornell and Kristina Oritz went to a house in South Bend to pick up a friend, Kristina Kendall. Kendall was not ready when Cornell and Oritz arrived and asked them to wait. While Cornell and Oritz were waiting in the living room, Warren and another man appeared in the room. Warren, who was armed with a gun, took Cornell's cell phone and car keys. The other man took Oritz's cigarettes and then reached down her shirt and up her skirt and asked, "Where's the money, is it in your titties, or your kuchie?" Tr. p. 146. Warren put the gun to the side of Cornell's head and asked her where the money was. When the men realized that Cornell and Oritz did not have any money, Warren returned Cornell's keys and told them to leave. The women left and reported the incident to police later that evening.

On August 28, 2009, Warren was charged with two counts of Class B felony robbery. At the beginning of trial, Warren objected to the trial court's preliminary

instruction on reasonable doubt and tendered his own reasonable doubt instruction, Defendant's Preliminary Instruction No. 1,[1] which provided:

> A "reasonable doubt" is a fair, actual and logical doubt and a reasonable doubt may arise from the evidence or from a lack of evidence or from a conflict in the evidence on or concerning a given fact or issue. It is a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation.

Amended App. p. 15. The trial court rejected Warren's proposed instruction, and instead gave Court's Instruction No. 6, which provided:

> A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of a crime or crimes charged, you should find him guilty of that crime or those crimes. If on the other hand, you think there is a real possibility that he is not guilty of a crime or the crimes changed, you must give him the benefit of the doubt and find him not guilty as to that crime or those crimes.
>
> The rule of law which requires proof beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant's guilt. To return any verdict, on any count, your verdict as to that count must be unanimous.

[1] It appears that Warren subsequently submitted a second reasonable doubt instruction for consideration as a final instruction. See Amended App. pp. 50-52. Because the substance of this proposed instruction is almost identical to Court's Instruction No. 21, we assume Warren's arguments on appeal are based on Defendant's Preliminary Instruction No. 1.

Id. at 32.

During the course of trial, the trial court clarified that it based its refusal of Warren's proposed preliminary instruction on our supreme court's decision in Winegeart v. State, 665 N.E.2d 893, 902 (Ind. 1996), recommending that Indiana trial courts instruct juries on reasonable doubt based on a Federal Judicial Center pattern instruction without supplementation or embellishment. The trial court explained that it refused to give Warren's proposed instruction as a preliminary instruction and would refuse to give it as a final instruction because it contained supplementation and embellishment. However, the trial court also explained that the pattern jury instruction had changed, referred the parties to the most current version of the pattern jury instruction, asked the parties to review it, and indicated it would read that instruction as a final instruction. See Tr. p. 242.

After the defense rested, the trial court again addressed the issue of jury instructions. The trial court informed counsel that it would not reread its initial instruction on reasonable doubt, Court's Instruction No. 6, but would instead give the pattern jury instruction 1.15 verbatim as Court's Instruction No. 21. Referring to the difference between the preliminary and final reasonable doubt instructions, the trial court stated:

> Unless each of you tell me, no, I'm just going to tell the jury that you were given an instruction on reasonable doubt in preliminary instructions, the reasonable doubt instruction in the final instructions differs in a couple of ways, and I'm not going to specify in what way, but that they should for purposes of their deliberation they should consider that

> reasonable doubt instruction as read to them in the final instructions.

Id. at 395. The trial court then asked defense counsel and the prosecutor if they had a problem with that approach, and both responded, "No." Id. Later, when asked whether they wanted to create a record regarding the trial court's instructions, both parties responded, "No." Id. at 396.

Before reading the final instructions, the trial court explained to the jury:

> I will tell you that from time to time the law changes. And the law has changed very, very recently. And you will note when you listen to it, that the instruction that I read to you concerning reasonable doubt, may have some differences from the instruction I read to you in the preliminary instructions.
>
> It is the final instruction that you should consider as the best of source of law as it relates to your deliberations, and not what you recall the preliminary instruction to be, okay?

Id. at 403. The trial court instructed the jury as follows:

> The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.
>
> A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.
>
> A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute

> certainty. The State does not have to overcome every possible doubt.
>
> The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.
>
> If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.

Amended App. p. 48.[2] The jury found Warren guilty as charged. The trial court sentenced Warren to fifteen years on each count and ordered the sentences be served concurrently. Warren now appeals.

Analysis

I. Reasonable Doubt Instruction

Warren argues that the jury was improperly instructed on reasonable doubt. "The purpose of the instructions is to inform the jury of the law applicable to the facts of the particular case." Clark v. State, 732 N.E.2d 1225, 1230 (Ind. Ct. App. 2000). "To be erroneous, instructions must either as a whole misstate the law or otherwise mislead the jury. Id. "We review a trial court's decision on how to instruct a jury for abuse of discretion." Treadway v. State, 924 N.E.2d 621, 636 (Ind. 2010). When evaluating the jury instructions on appeal, we look to whether the tendered instructions correctly state the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the proffered instruction is covered by other instructions. Id.

[2] In paginating the Amended Appendix, a page between 48 and 49 was not numbered. Court's Instruction No. 21 is on that unnumbered page. This instruction was given to the jury in writing and was read to the jury. See Amended App. p. 80; Tr. p. 437.

We will reverse a conviction only if the appellant demonstrates that the instructional error prejudices his or her substantial rights. Id.

Warren first argues that the differences between the preliminary and final instructions are significant and misleading to the average juror. The trial court, however, explained its intention to read the pattern jury instruction as the final instruction, and Warren did not object on this basis during trial. A defendant may not appeal the giving of an instruction on grounds not distinctly presented at trial. Helsley v. State, 809 N.E.2d 292, 302 (Ind. 2004) (citing Ind. Trial Rule 51(C) ("No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.")). Because Warren did not object to Court's Instruction No. 21 on this basis, this argument is waived. See id. (concluding that defendant's claim was procedurally defaulted for failing to present the claim at trial).

Waiver notwithstanding, although the two instructions were different, the general concepts of reasonable doubt remained the same. Moreover, before reading the final instructions to the jury, the trial court explained to the jury that the two instructions were different and instructed the jury to use Court's Instruction No. 21 during its deliberations. Without more, we do not agree with Warren that the jury was misled by this approach. See, e.g., Gordon v. State, 609 N.E.2d 1085, 1088 (Ind. 1993) ("Admonishment of the jury is generally presumed to cure any error unless the contrary is shown.").

Warren also argues, "both instructions omitted the following sentence found in the pattern jury instruction on this issue: 'A reasonable doubt may arise either from the

evidence or from a lack of evidence.'" Appellant's Br. p. 7. (quoting Ind. Pattern Jury Instruction 1.15). Although Court's Instruction No. 6 did not include this language, Court's Instruction No. 21, both as written and as read to the jury, did contain this language. See Amended App. pp. 48, 80; Tr. p. 437. Because Court's Instruction No. 21 included this language, this alleged error is unavailing.

Warren further contends that the trial court abused its discretion by refusing to give his tendered preliminary instruction because it was a correct statement of law, was supported by the evidence, and was not covered by other instructions. We cannot agree. "Preliminary and final instructions are considered as a whole, not in isolation." Price v. State, 765 N.E.2d 1245, 1252 (Ind. 2002). Court's Instruction No. 21 included the substance of Defendant's Preliminary Instruction No. 1. Because Warren's proposed reasonable doubt instruction was covered during final instructions by Court's Instruction No. 21, we believe that the jury was adequately instructed on reasonable doubt. See id. (concluding jury was adequately instructed on self-defense where final instructions properly explained burden of proof for self-defense even though preliminary instructions did not include such an instruction).

Warren has not established that the jury was erroneously instructed regarding reasonable doubt. As such, we need not determine whether the alleged errors prejudiced his substantial rights.

II. Sentence

Warren argues that his fifteen-year sentence is inappropriate under Indiana Appellate Rule 7(B) in light of nature of the offense and the character of the offender.

Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id. Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Id. at 1224.

The State requested that the trial court impose consecutive twelve year sentences, and the trial court sentenced Warren to fifteen years on each count based on his criminal history and ordered the sentences be served concurrently. We believe the nature of the offense and the character of the offender support the fifteen-year-sentence.

As for the nature of the offense, Warren suggests that Cornell and Oritz were involved in a marijuana transaction that night and contends that "there is a qualitative difference between the robbery of two drug dealers and the robbery of two innocent

young women when it comes to sentencing considerations." Appellant's Br. pp. 8-9. In support of this argument, Warren directs us to the trial testimony of Kendall, his girlfriend, indicating that Cornell and Oritz brought marijuana to the house. Regardless of this testimony, Cornell and Oritz testified that Warren and another man robbed them at gunpoint. Oritz testified that she thought they were going to be raped and then shot and that she did not think they were going to leave the house that day. Even if Cornell and Oritz were involved in a marijuana transaction, such participation does not reduce the seriousness of the offense of which Warren was convicted.

Regarding his character, Warren argues that his growing up without a father, his children, and his successful completion of probation should be considered mitigating. Warren's criminal history, however, includes, among other offenses, a juvenile adjudication for what would have been Class C felony robbery if committed by an adult and two convictions for Class A misdemeanor theft. In light of Warren's criminal history, we are not convinced that his character necessitates reducing his sentence. Considering the nature of the offense and the character of the offender, we conclude the fifteen-year sentence is not inappropriate.

Conclusion

Warren has not established that the trial court abused its discretion in instructing the jury or that his sentence is inappropriate. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.